BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN D. MAZOUCH Claimant VS. **U.S.D. 428** Respondent AND **EMCASCO INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,058,571
SUSAN D. MAZOUCH Claimant VS. **WAL-MART** Respondent AND **ILLINOIS NATIONAL INS. CO.** Insurance Carrier	)	Docket No. 1,058,572

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 6, 2012, Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent U.S.D. 428 and its insurance carrier, Emcasco Insurance Company (U.S.D. 428). Michael D. Streit, of Wichita, Kansas, appeared for respondent Wal-Mart and its insurance carrier, Illinois National Insurance Company (Wal-Mart).

The Administrative Law Judge (ALJ) found that the evidence failed to establish that claimant's work duties for Wal-Mart were the prevailing factor in the development of her current symptoms. Further, the ALJ found that the evidence did not establish that claimant's work duties at U.S.D. 428 were the prevailing factor for the development of her back complaints. In addition, the ALJ found that claimant's fibromyalgia and back complaints were preexisting conditions and the aggravations caused by her subsequent work activities do "not rise to the level of a compensable accident."[1] However, the ALJ found that claimant's work duties for U.S.D. 428 were the prevailing factor in the development of her bilateral upper extremity complaints. Accordingly, U.S.D. 428 was ordered to provide claimant with the names of two qualified physicians from which claimant may choose one to be her authorized treating physician. U.S.D. 428 and its insurance carrier were further ordered to pay claimant temporary partial disability benefits at the rate of $59.77 per week from November 22, 2011, until further order of the court. Reimbursement to claimant of her unauthorized medical expenses was ordered to be paid equally by U.S.D. 428 and Wal-Mart and the costs of the proceedings were assessed equally to both respondents.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 5, 2012, Preliminary Hearing and the exhibits, and the transcript of the discovery deposition of Susan D. Mazouch taken December 1, 2011, together with the pleadings contained in the administrative file.

ISSUES

Claimant asserts she suffered personal injuries by accidents which arose out of and in the course of her respective employment with respondents U.S.D. 428 and Wal-Mart through October 19, 2011. Claimant further argues the repetitive work she performed at both U.S.D. 428 and Wal-Mart was the prevailing factor in causing her bilateral carpel tunnel syndrome and myofascial pain syndrome and that none of her injuries were preexisting conditions. Claimant asks the Board to reverse the ALJ's Preliminary Hearing Order and remand these cases to the ALJ with instructions to find that she met her burden of proving her personal injuries arose out of and in the course of her employments with U.S.D. 428 and Wal-Mart and to order each employer to proportionately pay for her medical treatment and temporary partial disability benefits.

U.S.D. 428 asks the Board to apportion the liability for claimant's medical treatment and temporary partial disability benefits between Wal-Mart and U.S.D. 428. U.S.D. 428 argues the term "prevailing factor" should not be interpreted to mean that if the tasks performed for an employer cause a larger portion of an employee's injuries, the work activities for a second employer cannot be found to also be a prevailing factor.

---

[1] ALJ Preliminary Hearing Order (January 6, 2012) at 1.

Wal-Mart contends claimant failed to meet her burden of proving she suffered an on-the-job carpal tunnel injury while working at Wal-Mart. Nor was there any evidence presented that claimant's employment at Wal-Mart exposed her to an increased risk or hazard to which she would not have otherwise been exposed. Wal-Mart further argues that claimant presented no evidence that any repetitive job duties at Wal-Mart were the prevailing cause of her bilateral carpal tunnel syndrome and that claimant's testimony relates her carpal tunnel symptoms to her job at U.S.D. 428. Wal-Mart also asserts that claimant's back condition was preexisting and is not compensable under the amendments to the Workers Compensation Act which came into effect on May 15, 2011. Accordingly, Wal-Mart asks that the ALJ's Preliminary Hearing Order be affirmed.

The issues for the Board's review are:

(1) Did claimant meet with personal injuries by accidents or repetitive traumas to her bilateral upper extremities and/or to her back that arose out and in the course of her employment with U.S.D. 428 and/or Wal-Mart? If so, on what date or dates and what law applies to these claims?

(2) Was the repetitive trauma in claimant's employment at U.S.D. 428 and/or Wal-Mart the "prevailing factor" in causing any of her medical conditions?

(3) Should the expenses of claimant's medical treatment and claimant's temporary partial disability benefits be apportioned between U.S.D. 428 and Wal-Mart?

FINDINGS OF FACT

Claimant is 52 years old and has worked for U.S.D. 428 in food service since December 1998. She began as a substitute and worked various jobs, including serving food, doing dishes, and rolling out cinnamon rolls. In August 1999, claimant was hired as a permanent employee, although she did not work 40 hours per week. Sometime after claimant was hired as a permanent employee of U.S.D. 428, her daughter began having serious medical issues and claimant was required to reduce her hours to 2 to 3 hours per day.[2] She worked at the middle school, and her job tasks included serving food and drying and putting away dishes. Claimant testified she prepared cinnamon rolls during the entire time she worked for U.S.D. 428. She did not mix the dough, but she rolled out the dough, cut it and placed it in the pan to rise.

On July 27, 2010, claimant began a second job as a part-time employee working 25 to 35 hours per week for Wal-Mart. She started working in the deli, where her job included slicing meat and cheese, washing dishes, carrying out trash, and mopping the floor. After

[2] Claimant could not remember when her daughter's health problems began or when her hours at U.S.D. 428 were reduced.

about two months, claimant was moved from the deli to a job as a cashier, where she was required to stand on her feet for long periods and scan items of different weights. Claimant eventually asked for a transfer, and on July 16, 2011, she was moved from her job as a cashier to the floor, where she works in the clothing department. Her current job duties allow her to walk around rather than stand in one spot, and her tasks include hanging and folding clothes and picking up after customers. Although she asked for the transfer because of her physical problems, she does not remember if she told management at Wal-Mart that she was having health issues at the time she asked for the transfer.

When the school year started in August 2011, claimant asked for more hours at the school. She was given more hours but still was not working 40 hours a week; she believed she was probably working about 20 to 25 hours per week. She was given additional duties of washing dishes and helping with the mashed potatoes and the dinner rolls. She still continued to roll out and prepare cinnamon rolls when they were on the menu and still helped serve meals. She testified that mashed potatoes were served once or twice a week at the school district, and cinnamon rolls were served twice every six weeks. She washed dishes every day.

Claimant testified that at some point, she could not remember when, she began experiencing numbness in her hands. At first, the problem was just in her hands, and then as she worked, the pain would radiate up her arm and cause tightness and pain in her shoulders and neck. At Wal-Mart, she had problems while working as a cashier when she was scanning items. Claimant said she would lose her grip on items. She also said standing for long periods of time working as a cashier bothered her low back and hips. Claimant noticed her hand symptoms worsened dramatically in the fall of 2011 after she returned to school and took on the additional duties. She especially noticed problems at U.S.D. 428 when she was working on cinnamon rolls, working on the mashed potatoes, and doing dishes.

Claimant acknowledged that she had been receiving chiropractic treatment for several years for pain in her lower back that moved up her back to her neck. She most recently had been seeing Dr. Aaron Sauer. She said that as well as her back and neck, Dr. Sauer would check her shoulders, elbows and hands and work on her wrists. She testified, "I have had continual problems with them, but they had continually gotten worse."[3] She also said that Dr. Sauer could tell whenever she had worked on cinnamon rolls because she would have more problems in her neck, back and hands. Dr. Sauer referred claimant to a neurologist, Dr. Trent Davis, whom claimant saw on October 12, 2011. Dr. Davis performed EMG and NCT tests on claimant and then diagnosed her with severe bilateral carpal tunnel syndrome.

[3] Mazouch Discovery Depo. at 37.

On or about October 17, 2011, claimant reported her problems to her supervisor at U.S.D. 428. She gave him the report from Dr. Davis and told him she would be unable to continue working on dinner rolls and cinnamon rolls, working with the mashed potatoes, and doing dishes, all of which are hand-intensive jobs. Her supervisor told her he would get someone to take over those duties. Claimant also reported her injuries to Mr. Brungardt, who worked in the district administrative offices at U.S.D. 428. Mr. Brungardt told claimant she also needed to file a workers compensation claim against Wal-Mart. Claimant said she filed the claim with Wal-Mart the same day she spoke with Mr. Brungardt.

Claimant was sent by U.S.D. 428 to Dr. C. R. Keener, and she was seen on October 19, 2011. Dr. Keener recommended a CT scan of claimant's cervical spine and referral to an orthopedic surgeon, neither of which were approved by U.S.D. 428. He also placed a restriction on claimant that she only occasionally perform repetitive hand tasks. At U.S.D. 428, claimant now only works 2.25 hours per day, five days a week, serving food at the middle school. That job has not been causing her too many problems.

Claimant did not provide Wal-Mart with a copy of Dr. Keener's restrictions. By this time, she was working in the clothing department and only worked as a back-up cashier. Claimant said she worked as a back-up cashier about every day for about a hour. Claimant said after being moved to the clothing department, she worked close to 40 hours a week because of the Christmas season. After Christmas, her hours were reduced to 31 hours per week and then to 26 hours per week. She said she now works only about 20 hours per week. No one at Wal-Mart has told her why her hours have been reduced. Claimant said a bulletin has been posted at Wal-Mart where employees clock in stating that anyone wanting more hours or wanted to work as a cashier should let Wal-Mart management know. Claimant testified she would like more hours at Wal-Mart but does not believe she could work as a cashier. She said that about a week before the preliminary hearing she told the management at Wal-Mart that she was unable to do any cashiering because of her pain.

Claimant testified she initially reported her injuries to U.S.D. 428 because of her duties at the school district and the amount of time she had worked there performing those duties. She acknowledged she would not have filed a claim against Wal-Mart if Mr. Brungardt had not instructed her to do so.

Claimant acknowledged she had a long history of medical problems. She fell while working at Wal-Mart in August 2010, suffering right hip pain. A doctor's report indicates claimant, while working in the deli at Wal-Mart, complained of neck and shoulder problems and numbness and tingling in both hands that she thought was caused by washing dishes. Claimant also admitted that in October or November 2007 she fell down some stairs in a

basement and injured a shoulder.[4] Also at that time, she complained of having numbness and tingling in both hands. Claimant said she had problems with numbness and tingling before the fall in 2007. Claimant also stated that during the fall of 2010, there had been an ice storm and she fell as she was coming out of the middle school, hitting her arm against the sidewalk.[5]

Claimant's wage at U.S.D. 428 as of the start of the school year in August 2011 was $12.10 per hour. At Wal-Mart, claimant was earning $8.65 per hour.

Claimant was evaluated by Dr. C. Reiff Brown on December 12, 2011, at the request of claimant's attorney. Claimant gave him a history of working for U.S.D. 428 for 13 years as a food server. She told him she worked 3 to 6 hours per day depending on the menu. The job was described as hand-intensive. Claimant said she had an onset of discomfort, tingling, numbness and weakness of the hands in the course of that repetitious work which has worsened over the years, causing her to decrease her work schedule to 2 hours per day and discontinuing preparing mashed potatoes and dishwashing. Claimant also described her work at Wal-Mart, where she started working in July 2010, and repetitively used her hands for 2 months while working in the deli and for 9 more months thereafter when she worked as a cashier.

Claimant told Dr. Brown her current complaints were intermittent numbness and pain in her hands, severe loss of dexterity of the fingers, weakness of grip strength, and numbness in both hands which usually was the result of activities during which she holds her hands in one position. She has pain in her shoulders which starts in the shoulder blade area and extends up into the sides of her neck and over the top of both shoulders. She also complained of low back pain extending outward into the hips as a result of prolonged standing necessary in her jobs, as well as heavy lifting.

Claimant told Dr. Brown she believed her hand, arm and shoulder symptoms have been contributed to largely by her work for U.S.D. 428, although the constant scanning items at Wal-Mart while she was a cashier markedly increased her upper extremity symptoms. Claimant estimated that 3/4 of her present upper extremity symptoms were the result of the work she did at U.S.D. 428 while the remaining 1/4 was the result of the work she performed at Wal-Mart.

Dr. Brown diagnosed claimant with bilateral carpal tunnel syndrome and myofascial pain syndrome involving her scapular and shoulder musculature. He opined that the work claimant performed for U.S.D. 428 and Wal-Mart exposed claimant "to an increased risk

[4] This was not a work-related injury.

[5] Claimant did not identify which arm she hit.

or hazard which she would not have been exposed in normal, non-employment life"[6] and the increased risk or hazard was the prevailing factor in causing the repetitive trauma and in causing her medical conditions and her resulting disability and impairment. It is Dr. Brown's opinion that the work claimant performed for U.S.D. 428 was the prevailing factor in 75 percent and the work for Wal-Mart was the prevailing factor in 25 percent of both the medical conditions and the resulting disability or impairment.

Dr. Brown believes claimant is in need of additional treatment. He believes she should have conservative treatment of her myofascial pain syndrome and surgical treatment of her bilateral carpal tunnel syndrome. He recommends she avoid work that involves frequent flexion and extension of the wrists greater than 30 degrees. She should avoid frequent firm grasp-type activities with the hands and work that involves frequent use of the hands above shoulder level and frequent reach away from the body more than 18 inches.

PRINCIPLES OF LAW

L. 2011, ch. 55, sec. 5 (K.S.A. 44-508) states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
>
> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

[6] P.H. Trans., Resp. Ex. A at 11.

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an

> issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

L. 2011, ch. 55, sec. 4 (K.S.A. 44-503a) states:

> Whenever an employee is engaged in multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, and such employee sustains an injury which arose out of and in the course of the multiple employment with all such employers, and which did not clearly arise out of and in the course of employment with any particular employer, all such employers shall be liable to pay a proportionate amount of the compensation payable under the workmen's compensation act as follows: Each such employer shall be liable for such proportion of the total amount of compensation which is required to be paid by all such employers, as the average weekly wages paid to the employee by such employer, bears to the total average weekly wages paid to the employee by all such employers, determined as provided in subsection (b)(3) of K.S.A. 44-511, and amendments thereto.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Each of the injuries and conditions for which claimant is seeking compensation is alleged to be as a result of a series of accidents and/or repetitive traumas. The work activities to which claimant points as the cause of her injuries overlap the May 15, 2011, changes to the Kansas Workers Compensation Act. It is, therefore, necessary to determine a date of accident or date of injury in order to determine what law applies to these claims.

In Docket No. 1,058,571, claimant alleged injuries to her "[b]ilateral upper extremities" from performing "[r]epetitive job duties" at U.S.D. 428 during a "[s]eries through 10-12-11."[9] In Docket No. 1,058,572, claimant alleged injuries to her "[b]ilateral upper extremities" from performing "[r]epetitive job duties" at Wal-Mart during a "[s]eries through

---

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

[9] Form K-WC E-1, Application for Hearing filed November 22, 2011.

10-21-11."[10] The bilateral upper extremity conditions include carpal tunnel syndrome at the wrists and myofascial pain syndrome involving the scapular and shoulder musculature. At the preliminary hearing, these claims were orally amended to include repetitive trauma injuries to claimant's spine and paraspinous musculature from her low back up to and including her neck.[11]

Under the law that took effect on May 15, 2011, the date of injury for a repetitive trauma is the earliest of:

> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.[12]

Claimant is still working for both employers and has not been taken off work by a physician. As such, No. 1 and No. 4 are not applicable to either docketed claim or any diagnosed repetitive trauma injury.

Claimant began working at U.S.D. 428 in December 1998. Claimant began working at Wal-Mart on July 27, 2010. Claimant was first diagnosed with bilateral carpal tunnel syndrome by Dr. Davis following the EMG and NCT tests in October 2011. It is not clear from this record whether Dr. Davis advised claimant that her condition was work related or, for that matter, which work it was related to. Dr. Sauer attributed claimant's symptoms to her work but it is not clear whether he diagnosed carpal tunnel syndrome before October 2011 and whether he informed claimant that her condition or conditions were work related. Nevertheless, on or about October 17, 2011, claimant reported her problems to her supervisor at U.S.D. 428 and told him she could not continue working on making rolls, making mashed potatoes, and washing dishes. Claimant also received restrictions from

---

[10] Form K-WC E-1, Application for Hearing filed November 22, 2011.

[11] It is not clear from her testimony if claimant is alleging her low back condition was caused or aggravated by her work with either or both respondents or if her injuries are limited to the upper back, shoulders and neck areas, in addition to the carpal tunnel syndrome conditions. At the preliminary hearing, counsel for claimant indicated he would only be amending the claim in Docket No. 1,058,572 to add the lower and upper back. Counsel for claimant further announced that he would be amending both claims to allege a date of "accident" [*sic*] as a series to October 19, 2011.

[12] L. 2011, ch. 55, sec. 5.

Dr. Keener. As a result, claimant's job duties were changed. Accordingly, the tests in Nos. 2 and 3 were satisfied, making the upper extremity injuries subject to the new law insofar as the employment at U.S.D. 428 is concerned. It was after this date that claimant informed Wal-Mart of her injuries.

Although claimant had symptoms in her hands, shoulders, neck and back before May 15, 2011, the record does not establish that those conditions were diagnosed and claimant advised they were work related or that claimant was placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma prior to May 15, 2011. Consequently, claimant's injuries are governed by the new law.[13]

Claimant's work in the cafeteria for U.S.D. 428 and her work in the deli at Wal-Mart were very similar employments. Claimant's other jobs at Wal-Mart as a cashier and as a floor worker were less similar duties but involved very similar physical requirements as the cafeteria work. Claimant, in her brief to the Board, does not address apportionment under L. 2011, ch. 55, sec. 4 (K.S.A. 44-503a) or the rate at which temporary total or temporary partial disability compensation should be paid. Nevertheless, claimant does argue that the prevailing factor for her injuries is both employments and both employers should be found liable for the payment of benefits. U.S.D. 428 argues:

> K.S.A. 44-503a provides for an apportionment of liability in multiple employment situations. Whether or not this statute applies here, it is obvious that the "prevailing factor" statute cannot be interpreted to mean that a larger contribution by one employment requires that another employment must be found not to be a "prevailing factor."[14]

Wal-Mart does not address L. 2011, ch. 55, sec. 4 (K.S.A. 44-503a) directly but contends "prevailing factor" does apply as between employers and, consequently, whichever contributed in the greater degree to claimant's injuries is responsible for 100 percent of the benefits. Prior to May 15, 2011, K.S.A. 44-503a provided that it applied where an "employee sustains an injury by accident which arose out of and in the course of the multiple employment . . . ." Under the law that existed before May 15, 2011, the definition of an accident included cumulative repetitive traumas and microtrauma. Injuries resulting from cumulative or repetitive traumas were compensated the same as injuries suffered by a single traumatic accident. Beginning May 15, 2011, an "accident" and "repetitive trauma" are defined separately. Effective May 15, 2011, K.S.A. 44-503a was amended to remove "by accident" such that the statute now applies where the "employee sustains an injury

---

[13] Claimant testified that she fell while working at Wal-Mart in August 2010 and suffered right hip pain and at that time also had neck, shoulder and hand symptoms. She sustained another fall later that year at U.S.D. 425. But the two docketed claims at bar are for injuries resulting from repetitive traumas, not for either of those two distinct accidents.

[14] Respondent U.S.D. 428 brief (filed Feb. 16, 2012) at 2.

which arose out of and in the course of the multiple employment . . . ." This shows an intent to include injury by repetitive trauma.

For a repetitive trauma to arise out of multiple employment, more than one employment must be the prevailing factor in causing the injury. Thus, the legislative intent must have been to take multiple employers in the aggregate when multiple employments contributed to an injury. Therefore, as both claimant's work at U.S.D. 428 and at Wal-Mart contributed to her bilateral upper extremity injuries, both employers are liable for a portion of claimant's benefits.

CONCLUSION

Claimant met with repetitive trauma injuries to her bilateral upper extremities with a date of injury on or about October 2011 that arose out of and in the course of her employment with both U.S.D. 428 and Wal-Mart.[15] Each employer is liable for the proportion of the compensation as the average weekly wages paid to claimant by each employer bears to the total average weekly wages paid to claimant by both employers combined. Claimant's back and neck conditions preexisted her employments with both respondents. Those conditions were aggravated by her work at both employments, but the record fails to prove an additional injury caused by that work.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 6, 2012, is affirmed in part, reversed in part, and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

[15] At the preliminary hearing, counsel for claimant alleged a date of injury of October 19, 2011. Counsel for both respondents denied injury but counsel for U.S.D. 428 acknowledged receiving notice of injury of October 19, 2011, whereas counsel for Wal-Mart acknowledged it had notice of injury on October 17, 2011. The ALJ did not make a specific finding for the date of injury in Docket No. 1,058,571 and did not find an injury occurred in Docket No. 1,058,572.

Dated this _____ day of April, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent U.S.D. 428 and its Insurance Carrier Emcasco Insurance Company
Michael D. Streit, Attorney for Respondent Wal-Mart and its Insurance Carrier Illinois National Insurance Company
Bruce E. Moore, Administrative Law Judge